IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 588 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SAHINDA ABDULLA NATHALWALA

Versus

STATE OF GUJARAT

Appearance:

MR SHAKEEL A QURESHI for Petitioner

MR BY MANKAD, APP for Respondent No. 1

MR MUKESH D RAVAL for Respondent No. 2

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 13/11/2000

ORAL JUDGEMENT

The Revision Petitioner, who is a wife of Revision Opponent No.2 has, by filing this Criminal Revision Application under Sec.397 of the Criminal Procedure Code, 1973, (In short `Cr.P.C.') challenged the legality, correctness and propriety of judgment Exh.23 dated 20th September, 1997, rendered by the learned Sessions Judge, Surat, (who will be referred to as `the

learned Judge of the Revisional Court') in Criminal Revision Application No.130 of 1996.

2. The facts leading to this present Criminal Revision Application, in a nutshell are as follows:

2.1 Applicant - Bai Sahinda Abdulla Nathalwala filed one Maintenance Application under Sec.125 of Cr.P.C. for herself and for her one minor child against her husband Arif Salim Memon in the Court of learned JMFC, 2nd Court, Surat, (who will be referred to hereinafter as `the learned Magistrate'). That Maintenance Application came to be registered as Maintenance Application No.40 of 1993. As per facts stated in that maintenance application, applicant married with opponent Arif Salim Memon about three years before 3rd May, 1993, according to Islamic Shariyat, as both of them are governed by Mohammedan Law. After marriage, applicant wife and her husband both started to live together as husband and wife, and out of their wedlock, applicant delivered one child who was aged about 1.3/4 years as on date of her application. As on date of her Maintenance Application she was pregnant. That Maintenance Application was finally decided and the learned Magistrate rendered his judgment dtd.8.11.96. During the pendency of that Maintenance Application, she delivered another child named `Salman' on or about 11.6.1993.

2.2 In that Maintenance Application, it is alleged by the applicant wife that, on or about 1.4.1993, the husband gave divorce (Talak) to the applicant-wife in presence of witnesses. It is also the case of the applicant that as the husband was giving mental and physical torture/cruelty to her, she went to house of her parents in the month of November, 1992, and since thereafter, the husband has never taken any care of applicant as well as her children for maintenance. The applicant and her two children are deserted and neglected by the husband for being maintained by the opponent-husband. It is the case of the applicant that husband is carrying on business and earns Rs.5,000/p.m. and, therefore, in her maintenance application she has claimed maintenance under Sec.125 of Cr.P.C. at the rate of Rs.500/- p.m. for her ownself. As on the date of her application, she had only one female minor child named `Hina', she has claimed Rs.500/- p.m. as maintenance for that minor child Hina.

2.3 In the proceeding of that Maintenance Application, the opponent No.2-husband appeared before the learned Magistrate and contested the said application

by filing his written statement. The Opponent-husband has practically denied all the pleadings of the applicant-wife pleaded in maintenance application. On the contrary, he has found fault with the applicant-wife. It is the case of the opponent-husband that, applicant herself left the matrimonial home without any cause being given by him. He requested the learned Magistrate to dismiss the application of applicant-wife.

2.4 The learned Magistrate framed necessary points for determination. Both the parties led their oral as well as documentary evidence in that Maintenance Application. After appreciating the evidence led by both the parties and after hearing the arguments of the learned advocates for both the parties, the learned Magistrate by rendering his judgment Exh.21 dated 08.11.1996 allowed that maintenance application and ordered and directed the opponent-husband to pay maintenance at the rate of Rs.450/-p.m. to applicant No.1 i.e. wife from the date of application; Rs.350/-p.m. as maintenance to applicant No.2 i.e. minor Hina w.e.f. 3rd May, 1993, and Rs.300/p.m. as maintenance to applicant No.3 i.e. minor Salman, who was born during the pendency of maintenance application w.e.f. 8.8.94. The learned Magistrate also ordered the opponent-husband to pay Rs.200/- as cost to the applicants.

2.5 Being aggrieved against and dissatisfied with the said judgment granting maintenance in favour of applicants, as aforesaid, the opponent-husband preferred a Criminal Revision Application No.130 of 1996 to the Sessions Court, Surat. The applicant-wife for herself and her two minor children preferred a Criminal Revision Application No.11/97 for enhancement of an amount of maintenance requesting the Revisional Court to revise the order of maintenance and to award maintenance at the rate of Rs.500/- p.m. to each applicant.

2.6 The learned Judge of Revisional Court, Surat, after perusal of record and proceedings of the case which was called for from the lower Court and after hearing the arguments of the learned advocates for both the parties, rendered his common judgment Exh.23 on 20.09.1997 by which he partly allowed the said two applications namely Criminal Revision Appln. No.130/96 preferred by opponent-husband and Criminal Revision Appln. No.11/97 jointly preferred by applicant-wife and her two children.

2.7. That two Criminal Revision Applications were decided and finally disposed of by one common judgment

Exh.23 dated 20th September, 1995, rendered by learned Judge of the Revisional Court, Surat. By that judgment the opponent-husband has been ordered and directed to pay Rs.2000/- for `Iddat Period' of four months at the rate of Rs.500/- to the applicant-wife. The order with regard to maintenance for each child has been modified and the opponent-husband was ordered and directed to pay Rs.450/to minor daughter Hina from the date of application and Rs.450/to minor son Salman w.e.f. 8.8.94. The learned Judge of the Revisional Court, Surat, also directed each party to bear his/her own costs.

2.8 Thereafter, the applicant-wife has by filing this Criminal Revision Application challenged the correctness, legality and propriety of common judgment Exh.23 dated 20th September, 1997, rendered by the learned Judge of the Revisional Court, Surat, in aforesaid two Criminal Revision Applications which came to dismissed by that common judgment.

3. I have heard Shri S.A.Qureshi, learned advocate for the Revision Petitioner i.e. applicant-wife, Shri B.Y.Mankad, learned APP for the Opponent No.1-State and Shri M.D.Raval, learned advocate for the opponent No.2 i.e. opponent-husband. I have gone through an impugned judgment which is challenged in this Criminal Revision Application.

4. At the outset of the arguments, Shri S.A.Qureshi, learned advocate for the applicant-wife has argued that this Criminal Revision Application is filed to challenge for maintenance order with regard to original applicant-wife only and not for any minor child. Shri M.D.Raval, learned advocate for the opponent No.2 has fairly conceded that he does not press order for maintenance order passed in favour of two minor children.

4.1 Shri S.A.Qureshi, learned advocate for the petitioner has argued that the learned Sessions Judge has only awarded Rs.2000/- in lumpsum as maintenance for four months of `Iddat' period at the rate of Rs.500/- p.m. In his order dated 20th September, 1997, the learned Judge of the Revisional Court has not made it clear as to whether he has set aside an earlier order dated 8th November, 1996, passed by the learned Magistrate by which the opponent-husband was ordered and directed to pay maintenance at the rate of Rs.450/-p.m. to applicant-wife with effect from date of application. Shri Qureshi has argued that the judgment rendered by learned Judge of the Revisional Court is not clear as to

whether original opponent-husband has been ordered to pay only Rs.2000/- and no other amount. In view of this, by way of seeking clarification, necessary reliefs are prayed for in this Criminal Revision Application.

5. Shri M.D.Raval, learned advocate for the opponent No.2 has argued that, in view of the provisions of The Muslim Women (Protection of Rights on Divorce) Act, 1986, (hereinafter referred to as `the Act'), the applicant-wife is not entitled to any maintenance under Sec.125 of Cr.P.C. He has drawn my attention to Sec.5 of the Act which reads as follows:

"Option to be governed by the provisions of Sections 125 to 128 of Act 2 of 1974:- If, on the date of the first hearing of the application under sub-section (2) of Section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 of the Code of Criminal Procedure, 1973, and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly."

Explanation:- For the purposes of this section, "date of the first hearing of the application" means the date fixed in the summons for the attendance of the respondent to the application.

5.1 By placing reliance on aforesaid Sec.5 of the Act, Mr. Raval has argued that, when it is an admitted fact that a divorced woman i.e. applicant-wife is required to declare by affidavit or other declaration in writing in such form as may be prescribed, stating that she would prefer to be governed by provisions of Sec.125 of Cr.P.C. and such affidavit or declaration is required to be filed in the Court hearing maintenance application. Mr. Raval has further argued that, in view of this the wife was expected to file an affidavit in the proceedings of Maintenance Application No.40/93 and as she has not filed any affidavit or declaration, she is not entitled to any maintenance under Sec.125 of Cr.P.C. According to arguments of Mr.Raval, the applicant-wife is entitled to maintenance as per Sec.4 of the Act and not under Sec.125 of Cr.P.C. By placing reliance on Sec.5 of the Act, Mr.Raval has argued that, in no case wife is entitled to

any compensation under the Provisions of General Law of the Cr.P.C. He has further argued that rights with regard to maintenance are now restricted by the provisions of the Act. Therefore, he has supported a judgment of the Sessions Court, by arguing that the learned Sessions judge has rightly awarded only an amount of Rs.2000/- as maintenance for `Iddat' period of four months at the rate of Rs.500/p.m. It is his arguments that, except this maintenance of Rs.2000/-, the applicant-wife is not entitled to any maintenance. In support of his arguments he has cited an authority of USMANKHAN BAHAMANI VS. FATHIMUNNISSA BEGUM AND OTHERS reported in AIR 1990 Andhra Pradesh 225, wherein, Full Bench has taken a view that a divorced Muslim woman cannot claim maintenance under Sec.125 of Cr.P.C. after passing of 1986 Act and the liability of her former husband is limited and that too during period of Iddat only. This authority is a Full Bench decision of Andhra Pradesh High Court.

6. In reply to aforesaid arguments, Shri Qureshi has cited a case of ARAB AHEMADHIA ABDULLA AND ETC., Vs. ARAB BAIL MOHMUNA SAIYADBHAI AND OTHERS reported in AIR 1988 GUJARAT 141, wherein this Court has held that by the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the orders passed by Magistrate under Sec.125 of Cr.P.C. ordering Muslim husband to pay maintenance to his divorced wife would not be non-est. There is no section in the Act which nullifies the orders passed by the Magistrate under Sec.125 of Cr.P.C. It is further held that once the order under Sec.125 of Cr.P.C. granting maintenance to the divorced woman is passed, then her rights are crystalized and she gets vested right to recover maintenance from her former husband. That vested right is not taken away by the Parliament by providing any provision in the Act. By Section 5 of the Act an option is given to the parties to be governed by the provisions of Secs.125 to 128 of the Cr.P.C. This section also indicates that the Parliament never intended to take away the vested right of Muslim divorced woman which was crystalized before the passing of the Act. It is further held that on the contrary the provisions of Muslim Women Act grant more relief to the divorced woman depending upon the financial position of her former husband.

7. Shri Qureshi has also cited a Full Bench decision of this Court in case of BIBI SULTAN SAIYED ABED SAIYAD Vs. MAHAMMADALI NAKIALI HAIDER MIRZA rendered in Special Criminal Application No.83 of 1989 (decided on 03.04.1998). In that Full Bench decision, the learned

Single Judge (Coram: V.H.Bhairavia,J.) had referred Special Criminal Application No.83 of 1989 to a larger bench on the ground that there are two different views prevailing on the same legal question. While passing the final order, the learned Single Judge has referred case of A.A.ABDULLA VS. A.B. MOHMUNA reported in AIR 1988 GUJARAT 141 (supra) and also a case of USMANKHAN (supra). The learned Single Judge, while passing an order, has referred the matter to the larger Bench on the ground that in view of conflicting decisions, the matter be referred to a larger Bench.

8. This Court in its Full Bench Decision has held that the learned Single Judge is bound to follow the decisions of another Single Judge on the principles of judicial comity, propriety and decorum, as he exercises coordinate jurisdiction. If he does not agree with the previous decision, he can refer the matter to a Division Bench. It is also held in that Full Bench decision that the decision of Full Bench of another High Court, in the instant case Andhra Pradesh High Court would not be a binding decision on the learned Single Judge of this Court and at the most it has a persuasive value.

9. This Court has examined aforesaid two decisions on the point as to whether provisions with regard to maintenance under Sec.125 of Cr.P.C. will be applicable to a divorced woman or whether provision under the Act will be applicable for maintenance. Mr.Raval is not in a position to persuade this Court for not following the decision of this Court i.e. decision rendered in AIR 1988 Gujarat 141 (supra). I find no other reason to differ from the views expressed by this Court (Coram: M.B.Shah, J.) in aforesaid Gujarat High Court decision. When this Court has given a clear finding that, in spite of the fact that there are provisions in the Act for divorced woman, the divorced woman is entitled to maintenance under Sec.125 of Cr.P.C. It may be noted that, this case of Gujarat High Court, has been referred to in Andhra Pradesh High Court decision but Andhra Pradesh High Court has taken a dissented view and that Court has come to a conclusion that divorced Muslim wife cannot claim maintenance under Sec.125 of Cr.P.C. after passing of 1986 Act. The reasons assigned by the Andhra Pradesh High Court in that decision are not acceptable on the ground that there is no provision in the Act in which it is so said that provisions of Cr.P.C. will not be applicable to divorced Muslim woman. Under the circumstances, the arguments of Mr.Raval cannot be accepted and his contentions are required to be rejected.

10. It may be noted that the learned Sessions Judge has not set aside the order of maintenance in favour of applicant-wife, passed under Sec.125 of Cr.P.C. possibly by placing reliance on the reasons assigned by the aforesaid the Gujarat High Court decision. This Court is of the view that when the learned Sessions Judge has not set aside the order granting maintenance in favour of wife, passed by the learned Magistrate that order stands as it is and its effect and operation are not curtailed by the judgment of the learned Sessions Judge. In judgment dated 20th September, 1997, the learned Sessions Judge has not referred anything about the order of maintenance granted to applicant wife by the learned Magistrate and therefore that order stands as it is. This Court is of further view that over and above that order, the learned Sessions Judge has awarded Rs.2000/in lumpsum as maintenance for Iddat period of four months. Keeping in mind the provisions of Sec.4 of the Act, Shri Qureshi has argued that, applicant-wife is not entitled to maintenance under both the statutes; one under the Cr.P.C. and another under the Act. In view of this, the order of learned Magistrate which is not set aside by the learned Sessions Judge can be clarified by this Court.

11. In view of discussions made hereinabove, this Criminal Revision Application is partly allowed. The order of maintenance dated 8.11.1996, passed in favour of applicant wife in Maintenance Application No.40 of 1993 is affirmed. As the learned Magistrate has awarded maintenance to applicant wife at the rate of Rs.450/p.m. from the date of application i.e. w.e.f. 3.5.1993, the applicant-wife is not entitled to maintenance for the period of four months of Iddat period i.e. from 1.7.1993 to 31.10.1993. For rest of the period, she is entitled to maintenance as awarded by the learned Magistrate. The Revision Opponent No.2 is directed to pay Rs.500/- as cost to the applicant wife for this present Criminal Revision Application. Rule is made absolute to the aforesaid extent.

(H.H. Mehta, J.)

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